SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-550

PAAC, as a Commission and Individually, and MELVIN L. HARDY,

Petitioners,

v.

FRANK L. RIZZO, et al.,

Respondents.

PETITION OF PAAC, AS A COMMISSION AND INDIVIDUALLY, AND MELVIN L. HARDY, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No. .

PAAC, AS A COMMISSION AND INDIVIDUALLY, AND MELVIN L. HARDY,

Petitioners,

v.

FRANK L. RIZZO, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Philadelphia Anti-Poverty Action Commission (hereinafter referred to as "PAAC") and Melvin L. Hardy, pray that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Third Circuit and in support thereof state the following:

OPINIONS BELOW.

Judgment was entered against your Petitioners by the United States District Court for the Eastern District of Pennsylvania and its opinion is reported at 359 F. Supp. 631 (E. D. Pa. 1974). The decision of the district court was affirmed by the Court of Appeals for the Third Circuit albeit on different grounds in an opinion not yet reported, a copy of which is appended hereto, *infra* at A1.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on June 14, 1974. A Petition for Rehearing was denied on August 14, 1974. On November 1, 1974 this Court granted Petitioners an extension of time until November 9, 1974 in which to file their Petition for Writ of Certiorari. Jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1) (1970).

QUESTIONS PRESENTED.

1. Did not the Court below err in concluding that local governing units who have elected to participate in programs based on a scheme of cooperative federalism can thereafter disregard the terms and conditions attached to the grant of federal funds?

2. May the governing officials of the City of Philadelphia by executive fiat destroy the autonomy of PAAC, a local grantee agency recognized by OEO, where that autonomy was established as part of the terms and conditions for the granting of federal funds?

3. Where the undisputed evidence established that since its creation in 1965 PAAC functioned as an autonomous agency, did not the court below err in ruling that local governing officials had the right to disregard that autonomy and gain control over the operations of PAAC?

STATUTES AND RULES INVOLVED.

Economic Opportunity Act of 1964, as amended, 42 U. S. C. A. § 2701 et seq., together with the rules and regulations promulgated pursuant thereto by the Office of Economic Opportunity.

STATEMENT OF THE CASE.

Petitioners instituted suit to obtain an injunction prohibiting respondents from further interfering with the lawful functions and duties of PAAC, the local grantee agency approved by the Office of Economic Opportunity (hereinafter referred to as "OEO") to conduct and administer the local effort in the war against poverty. Petitioners also sought to have Melvin Hardy reinstated as the Executive Director of PAAC, a position he held for several years until summarily discharged by respondents on April 13, 1973.

In 1964, Congress enacted the Economic Opportunity Act, the avowed purpose of which was to mobilize the human and financial resources of the Nation to combat poverty in the United States. Federal Funding of the war against poverty was to be administered by OEO which agency was empowered to contract with local grantee agencies for the purpose of operating local programs. Congress directed OEO to foster "maximum feasible participation of the poor in management of the federal poverty program."

The City of Philadelphia desired to participate in the programs being administered by OEO and for that purpose Mayor James J. Tate promulgated an Executive Order on February 22, 1965 creating PAAC. From the outset OEO expressed concern that PAAC would be subject to domination by local officials in violation of Congress' mandate to insure maximum feasible participation of the poor. OEO made it clear that in order to receive funding PAAC would have to be an independent entity under the direction and control of its representative Board of Directors. Extensive negotiations were conducted between OEO and the City of Philadelphia to insure that PAAC would operate as an autonomous agency with full power and authority to control local anti-poverty programs.

From its inception in 1965, PAAC was indeed an autonomous agency and its Board of Directors exercised complete control over the planning, development and operation of the various anti-poverty programs under the OEO umbrella. All of the federal funds came through letters of credit issued directly to PAAC. The hiring and firing of all PAAC personnel was performed by the Executive Director subject, of course, to certain procedural safeguards. The Executive Order creating PAAC was silent on the procedure for removing the Executive Director of PAAC. This subject was discussed by and between OEO, the City of Philadelphia and representatives of PAAC and it was decided that the power of removal should be entrusted to PAAC's Board of Directors. Consistent with its independent status PAAC had its own by-laws. Those by-laws provide that the Executive Director is responsible to and under the control of PAAC's Board and clearly indicate that it is the Board which possesses the authority to discharge the Executive Director.

In 1967 the City of Philadelphia passed an Ordinance formalizing the existence of PAAC and setting forth the extensive powers exercised by PAAC's Board of Directors [Chapter 21-801 of The Philadelphia Code]. PAAC was expressly empowered, *inter alia*, to conduct, administer and coordinate anti-poverty programs in Philadelphia; to mobilize the resources of the City; to provide services and assistance designed toward the elimination of poverty; to carry out a community action program with the maximum feasible participation of the poor; to receive and account for funds; and to cooperate with federal, state and local governments in administering a community action program. In addition, the Ordinance provided that the Board of PAAC would select three nominees for the position of Executive Director from which the Mayor was authorized

to make the actual appointment. Nothing was set forth to alter the existing agreement that PAAC's Board would have the power and the authority to remove the Executive Director.

PAAC continued to operate as an autonomous agency free from interference by local governing officials. Late in 1967 Congress passed a series of amendments to the Economic Opportunity Act which are commonly known as the Green Amendments. Two distinct types of community action agencies were provided for by the Green Amendments, 42 U. S. C. A. § 2791: (1) agencies which are States or political subdivisions of States and (2) agencies which are public or private non-profit agencies or organizations designated by States or political subdivisions. Those agencies which fall into the former category are subject to control and domination by local officials operating through administering boards. Those agencies which fall into the latter category are autonomous bodies controlled by their boards of directors. There is nothing in the Green Amendments of 1967 to suggest that local officials were empowered to alter the structure and duties of existing grantee agencies. In February of 1968, however, OEO published Community Action Memo 80 suggesting that local officials could redesignate existing agencies subject to a number of conditions.

It is undisputed that the City of Philadelphia never attempted to have PAAC redesignated. On the contrary, PAAC continued to operate as a completely autonomous body. The Board of Directors, together with the staff of PAAC, continued to control and manage numerous anti-poverty programs. Many millions of dollars of federal funds were channeled through PAAC as the local grantee agency and, after the initial negotiations with OEO clarifying that PAAC was an independent agency, there was no

doubt as to the authority of the Board of Directors to manage and control the anti-poverty program.

The basic structure, duties and powers of PAAC remained constant from 1965 until the present City administration, under Mayor Rizzo, sought to make PAAC subservient to local governing officials. Local officials under Mayor Rizzo have taken a variety of actions designed to gain complete control over PAAC. On June 23, 1972, the Deputy Managing Director of the City of Philadelphia issued a Memorandum seeking to gain control by the Mayor's office of the appointment of all PAAC personnel. In July of 1972, the City of Philadelphia sought to gain control over the form and substance of all requests by PAAC to OEO for funds needed to carry on existing programs. In still another attempt to gain control over PAAC, the Mayor deviated from the prescribed manner of selecting Board members to represent designated community groups; for example, the Mayor selected a person to represent the NAACP although that group never recommended that individual for appointment to the Board. The attempts by Mayor Rizzo to gain control over the machinery of PAAC culminated in April of 1973 when the Mayor sent a letter to Melvin Hardy summarily dismissing him as the Executive Director of PAAC.

REASONS FOR GRANTING THE WRIT.

In ruling against Petitioners the district court found that PAAC was a subservient body subject to control by local governing officials. The district court based its finding on the conclusion that PAAC was created as an administering board within the meaning of the Green Amendments. The Court of Appeals agreed with Petitioners that the Green Amendments are irrelevant to a resolution of the issues presented here. PAAC was created long before en-

actment of the Green Amendments and the amendments themselves did not in any way alter the existing structure and powers of PAAC.

After acknowledging that the lower court's decision was based on inappropriate grounds, the Court of Appeals affirmed the decision on the ground that local law is controlling and that the terms and conditions imposed by OEO upon the grant of federal anti-poverty funds for the City of Philadelphia are not binding on local officials. The court below concluded that the terms and conditions attached to the grant of federal funds are only applicable in determining whether a local governing body is eligible for federal funds. The court below reasoned that since local governments do not have to create community action agencies, an agency which fails to comport with federal guidelines "is neither illegal or in contravention of the Supremacy Clause."

The simplistic approach taken by the court below completely ignores the fact that the City of Philadelphia received federal funds from OEO only after it agreed to respect PAAC's autonomy. Having accepted federal funds, the City of Philadelphia must abide by the terms and conditions imposed by OEO as to the structure and duties of PAAC. The decision of the court below is directly contrary to this Court's holding in *King v. Smith*, 392 U. S. 309 (1968). The issue in *King* did not involve eligibility for federal funding but, rather, was a suit by an individual claiming that he was harmed because a local governing body failed to comply with the terms and conditions attached to the grant of federal funds. The court held that if a state or political subdivision elects to participate in programs based on a scheme of cooperative federalism, it must comply with the terms and conditions imposed on the granting of federal funds and any local law which is inconsistent

with such federal conditions is to that extent invalid. This Court's decision in *King* was based on its prior decisions in *Ivanhoe Irrigation Dist. v. McCraken,* 357 U. S. 275 (1958) and *State of Oklahoma v. United States Civil Service Comm.,* 330 U. S. 127 (1947).

Indeed, the decision of the court below is in direct conflict with its own holding in *Rochester v. Baganz,* 479 F. 2d 603 (3rd Cir. 1973) and of the Fifth Circuit in *Robles v. El Paso Community Action Ag. Proj. Bravo, Inc.,* 456 F. 2d 189 (5th Cir. 1972). The undisputed evidence presented by Petitioners established that the structure and functions of PAAC were fixed in 1965 as the result of negotiations by and between OEO, PAAC and the City of Philadelphia. OEO insisted and was given assurances that PAAC would be an autonomous agency consistent with the mandate of the Economic Opportunity Act to provide for "maximum feasible participation of the poor." Moreover, the negotiations between the interested groups resulted in an agreement whereby PAAC's representative Board would possess the power to discharge PAAC's Executive Director. Clearly, local officials must not be permitted to brush aside valid agreements entered into as a condition for receiving federal funds.

CONCLUSION.

One of the avowed purposes of the Economic Opportunity Act of 1964 was to promote maximum participation by members of the community in the administration of OEO programs. Pursuant to this congressionally declared goal, large numbers of interested citizens and community groups in Philadelphia devoted tremendous amounts of time and effort in establishing and administering local anti-poverty programs. The leadership for all that has taken place since 1965 has been provided by PAAC, an

organization operated by and for the benefit of Philadelphia's indigent people.

Under Mayor Rizzo, the present City administration has attempted to reverse the practice of community control over the anti-poverty programs administered by OEO. At stake in this litigation is whether or not municipal officials will be permitted to brush aside the manner in which PAAC functioned since 1965 and to usurp control over the mechanisms of the agency established to conduct, with federal funding, the local war against poverty. The undisputed evidence convincingly established that PAAC was created and has actually functioned as an autonomous agency with ultimate control resting in its principal representative board. The City of Philadelphia never attempted to follow the procedure adopted and promulgated by OEO in order to redesignate PAAC as a subservient body. Rather, Mayor Rizzo accomplished this result by means of executive fiat.

Having accepted federal funds to operate anti-poverty programs, local governing officials are obligated to adhere to the terms and conditions attached to those funds. The court below clearly erred in concluding that the City of Philadelphia was free to disregard the agreements that it entered with OEO and to destroy the autonomy of PAAC. The implications of the decision below are of broad significance and effect all programs based on cooperative federalism. It is respectfully submitted that these matters are appropriate for resolution by this Court.

Respectfully submitted,

DONALD E. MATUSOW,
S. GERALD LITVIN,
Attorneys for Petitioners.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1914

PAAC as a Commission and individually and Melvin L. Hardy, both as the Executive Director of PAAC and individually, and Isaiah W. Crippins, both as General Counsel of PAAC and as an individual member of the Philadelphia and Pennsylvania Bar

v.

Frank L. Rizzo, Mayor of the City of Philadelphia and as an individual; Phillip Carroll, Deputy Mayor of the City of Philadelphia and as an individual; John Taglianetti, Assistant to the Mayor of the City of Philadelphia and as an individual; Hillel Levinson, Managing Director of the City of Philadelphia and as an individual; Lawrence Campbell, Deputy Managing Director of the City of Philadelphia and as an individual; Joseph W. Hickey, Deputy Finance Director of the City of Philadelphia and as an individual; Lennox L. Moak, Director of Finance of the City of Philadelphia and as an individual; Tom Gola, City Controller of the City of Philadelphia and as an individual; Peter Rothberg, Assistant to the Mayor of the City of Philadelphia and as an individual; William T. Peterson, allegedly the Acting Executive Director of the Philadelphia Anti-Poverty Action Commission; and Albert Letson, as an individual; Solomon Polen, Director of Finance, P.A.A.C., and as an individual

(D. C. Civil No. 73-957)

CITY OF PHILADELPHIA

v.

MELVIN L. HARDY and ISAIAH CRIPPINS

(D. C. Civil No. 73-990)

PAAC as a Commission and individually and Melvin L. Hardy, both as the Executive Director of PAAC and individually, and Isaiah W. Crippins, both as General Counsel of PAAC and as an individual member of the Philadelphia and Pennsylvania Bar, plaintiffs in Civil Action No. 73-957 and Melvin L. Hardy and Isaiah Crippins, defendants in Civil Action No. 73-990,

Appellants,

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 2, 1974

Before: VAN DUSEN, WEIS and GARTH, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 14, 1974)

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GARTH, *Circuit Judge*

We are called upon to resolve a conflict between the Mayor of Philadelphia, the Honorable Frank Rizzo, and the Philadelphia Anti-Poverty Action Commission ("PAAC"). For reasons other than those articulated by the District Court,[1] we conclude that it was proper for the Court to refuse the relief sought against Mayor Rizzo.

Melvin Hardy (a former Executive Director of PAAC), Isaiah Crippins (a former General Counsel of PAAC), and PAAC commenced this action in the District Court for the Eastern District of Pennsylvania on April 27, 1973. Their complaint includes a variety of claims concerning the alleged interference of Mayor Rizzo with the functioning of the antipoverty agency. By far the most prominent of these claims is the charge that the Mayor violated federal law by removing Melvin Hardy as the Executive Director of PAAC and by refusing to renew Mr. Crippins' contract as General Counsel. Less precise, but still present in the complaint, are charges that: (1) the Mayor illegally blocked appointments to PAAC made by its Executive Director; (2) the Mayor appointed persons to the PAAC Board illegally; (3) the Mayor convened PAAC meetings illegally; and (4) the Mayor defamed each of the plaintiffs. The complaint seeks declaratory and injunctive relief, as well as compensatory and punitive damages.

Four days after the above action was commenced, the City of Philadelphia instituted an action in state court against Hardy and Crippins, seeking to restrain the defendants from exercising their duties as Executive Director

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1. It is proper for an appellate court to affirm a *correct* decision of a lower court even when that decision is based on an inappropriate ground. *See* Helvering v. Gowan, 302 U. S. 238, 245 (1937).

and General Counsel of PAAC.[2] On May 3, 1973, Melvin Hardy and Isaiah Crippins removed the City's action to the District Court for the Eastern District of Pennsylvania, pursuant to 28 U. S. C. § 1441. Perceiving a close similarity between the two actions, the District Court then consolidated the original action brought by PAAC, Hardy and Crippins (District Court No. 73-957) with the City's removed action (District Court No. 73-990). On May 10, 1973, the Court conducted a one day hearing on the merits of the consolidated case.

After the hearing, the City moved for dismissal of No. 73-957 and for remand of No. 73-990 on the grounds of lack of subject matter jurisdiction. These motions were denied *sub silentio* by the District Court. In a memorandum opinion, the District Court found that:

(1) subject matter jurisdiction exists (pursuant to 28 U. S. C. § 1331) for the District Court to consider all matters raised in the consolidated actions; and

(2) federal law permits the Mayor to remove PAAC's Executive Director and to refuse to renew the contract of PAAC's General Counsel.

With regard to the peripheral matters raised in PAAC's original complaint, the Court stated:

> We have not considered the myriad of other allegations and issues raised in the pleadings for the following reason: (a) no evidence was presented at the hearing in connection therewith; (b) these matters were not briefed by the parties; and (c) in view of the issues decided herein, the other allegations and issues raised in the pleadings now appear moot.

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2. The City commenced this second action in the Court of Common Pleas of Philadelphia County.

Judgment was thereupon entered in favor of the defendants in No. 73-957 and in favor of the plaintiff in No. 73-990. PAAC and Hardy appeal pursuant to 28 U. S. C. § 1291.[3]

I. Background.

To understand the District Court's primary conclusions, it is necessary to trace briefly the history of relevant anti-poverty legislation. As part of the Economic Opportunity Act of 1964, Congress established a Community Action Program. This Program encouraged the development of local agencies to provide multiple services to impoverished communities. Originaly, the Program envisioned as a goal the "maximum feasible" participation of the poor in the development of Community Action Programs. By 1967, however, Congress recognized that the Community Action Program could not succeed without the support of locally elected officials. *See* 1967 U. S. Code, Congressional & Administrative News at 2448-9 (excerpted from House Report No. 866, 90th Cong., 1st Sess. 1967).

On December 23, 1967, Congress enacted the Green Amendments to the Economic Opportunity Act of 1964. These Amendments gave flexibility to the Community Action Program, permitting localities a choice in the type of "community action agency" that would qualify for federal funding. Under the Green Amendments, the agency may either be a "State or political subdivision of a State (having elected or duly appointed governing officials), or a combination of such political subdivisions" or it may be a "public or private non-profit agency or organization which

3. Although Isaiah Crippins joined PAAC and Hardy in the filing of a notice of appeal, Crippins has not submitted a brief to this Court. We limit our remarks in this opinion to the appellants before us, PAAC and Hardy. As to Crippins, we dismiss his appeal for failure to prosecute. *See* Fed. R. App. P. 3(a); 9 Moore's Federal Practice, ¶ 203.12.

has been designated by a State or such a political subdivision or combination of such subdivisions." 42 U. S. C. § 2790(a). The former administers its program through a *community action board,*[4] while the latter administers its program through a *governing board.* 42 U. S. C. § 2791(a).[5]

The Economic Opportunity Act is somewhat imprecise with regard to the distinctions between the two types of boards. A *governing board* has the power to "appoint persons to senior staff positions, to determine major personnel, fiscal, and program policies, to approve overall program plans and priorities, and to assure compliance with conditions of and approve proposals for financial assistance under this subchapter." 42 U. S. C. § 2791(e). The parallel powers of a *community action board,* on the other hand, are not made explicit by the statute. The Office of Economic Opportunity, however, has explained that in jurisdictions with community action boards, the "governing officials"[6] will exercise the same powers that gov-

4. To avoid confusion, "community action boards" are sometimes referred to as "administering boards" by the Office of Economic Opportunity.

5. 42 U. S. C. § 2791(a) provides:

> Each community action agency which is a State or a political subdivision of a State, or a combination of political subdivisions, shall administer its program through a community action board which shall meet the requirements of subsection (b) of this section. Each community action agency which is a public or private nonprofit agency or organization designated by a State or political subdivision of a State, or combination of political subdivisions, or is an agency designated by the Director under section 2790(d) of this title, shall have a governing board which shall meet the requirements of subsection (b) of this section.

6. Generally, the term "governing official" applies to:

> ". . . (a) the governor and legislature of any of the 50 States, the Commonwealth of Puerto Rico, or a self-governing territory, or (b) the top elected or duly appointed officials of a local political subdivision, District of Columbia, or a non-self-governing territory, who collectively possess the power to adopt and carry out local laws or ordinances."

OEO Community Action Program Memorandum No. 81, at 2.

erning boards exercise, unless the officials delegate these powers to the community action boards. OEO Community Action Program Memorandum No. 81 at 5.

In determining whether PAAC or Mayor Rizzo had the authority to remove Hardy, the District Court focused upon the fact that the appointive powers of community action agencies differ, depending upon whether the agency is administered by a governing board (lodging the appointive powers in the board itself) or by a community action board (lodging the appointive powers in governing officials). The Court thus posed as determinative the issue as to whether PAAC ". . . is a political subdivision of the City of Philadelphia administered by a 'community action board' or whether it is a public or private non-private agency administered by a 'governing board.' "

To resolve this issue, the District Court examined the history of the Philadelphia Anti-Poverty Action Commission. As the Court found, PAAC was created on February 22, 1965 by the Executive Order of former Mayor James H. Tate.[7] According to the uncontradicted testimony of appellant's witnesses, PAAC was (from 1965 to 1967) the only community action institution in the country that existed solely by virtue of an Executive Order. To mollify demands from Washington, a blue ribbon panel was formed to develop permanent legislation. As a result of the panel's efforts, the Philadelphia City Council adopted Bill No. 2846 on December 27, 1967. This Ordinance, appearing as Title 21-800 of the Philadelphia Code, provides, in pertinent part, that:

> (1) Creation of Commission. The Philadelphia Anti-poverty Action Commission is hereby created. It

7. The Order was authorized by Section 3-100(h) of the Philadelphia Home Rule Charter, which provides that the executive and administrative functions of the City shall be performed by ". . . such additional advisory boards as the Mayor may appoint."

shall be composed of an uneven number of members, not less than 31 nor more than 45 in number. All of the members of the Commission shall serve without compensation. The initial number of members of the Commission shall be 38 members and there shall be no change in the number of members of the Commission at any time unless two-thirds of the members appointed to the Board approve the change in membership. The members of the Commission shall select a chairman from among themselves. The term for which any member of the Commission shall serve shall be for a period of one year and until their successors are appointed and qualify.

(2) Appointment of Members. The Members of the Commission shall be appointed by the Mayor. [The ordinance then recommends that the Mayor appoint specific officials as members.]

* * *

(3) The Mayor shall select an Executive Director from among a panel of 3 persons whose names are submitted to the Mayor by the Commission. The Mayor shall be at liberty to request the Commission to present to the Mayor additional panels of 3 persons from which he may select an Executive Director. The request of the Mayor for additional panels shall not preclude him from selecting a name from among the prior panels.

* * *

(5) Powers and Duties. The Commission shall have the following powers and duties:

(a) To conduct, administer and coordinate Federal anti-poverty programs in Philadelphia;

(b) To mobilize the resources of the City of Philadelphia and its residents to combat poverty through a community action program;

(c) To mobilize and utilize resources, public and private, in an attack on poverty;

(d) To provide services, assistance and other activities of sufficient scope and size to give promise of progress through elimination of poverty or a cause or causes of poverty through developing employment opportunities, improving human performance, motivation, productivity or bettering conditions under which people live, learn and work;

(e) To carry out a community action program which is developed, conducted and administered with the maximum feasible participation of residents of the areas and members of the groups served;

(f) To cooperate with federal, state and local governments and their agencies and representatives in every way possible in the conduct, administration and coordination of a community action program;

(g) To act as an agency of the City of Philadelphia for any and all of the purposes set forth herein; and

(h) To receive, expend and account for funds, property and services supplied by federal, state or local governments, or by others, and in every way possible to further the purposes of the Commission.

The District Court concluded from the Executive Order and City Ordinance that "PAAC is an agency of the City, administered by a 'community action board', rather than a non-profit organization administered by a 'governing board'." Having found that PAAC is an agency of the City, the Court considered itself bound by federal law to hold that the *appointive power* lies with the governing official, Mayor Rizzo. Looking to state law, the Court noted that the *removal power* tracks the appointive power.[8] Accordingly, the Court held that it was proper for the Mayor to remove Melvin Hardy from office.

II. Jurisdiction.

Before evaluating the reasoning of the District Court (as outlined above), we find it necessary to discuss, as a threshold issue, the subject matter jurisdiction of the District Court. We shall analyze the Court's conclusion that jurisdiction vested (to consider *all* claims raised herein) by treating separately (1) the claim that Mayor Rizzo could not remove Hardy, (2) the peripheral claims raised by PAAC in 73-957, and (3) the removed claims.

A. *No. 73-957: The Primary Claim.*

We agree with the District Court that jurisdiction exists under 28 U. S. C. § 1331 to consider Hardy's claim that he was illegally discharged.

To confer original jurisdiction upon a district court pursuant to 28 U. S. C. § 1331, the complainant must assert a claim founded directly upon federal law. *Gully v. First National Bank*, 299 U. S. 109, 112 (1936); *Cabana Management, Inc. v. Hyatt Corp.*, 441 F. 2d 862, 864 (5th Cir. 1971). The federal right asserted "must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they

8. *See* p. 13, *infra*.

receive another." *Gully v. First National Bank, supra,* 299 U. S. at 112. Furthermore, the claim must be essential to plaintiff's cause of action, *Warrington Sewer Co. v. Tracy,* 463 F. 2d 771, 772 (3d Cir. 1972) (*per curiam*), and must raise a substantial federal question, *Hagans v. Lavine,* 42 U. S. L. W. 4381, 4384-4385 (March 26, 1974). For the claim to be substantial, it need not be one that will ultimately succeed on the merits. *See, e.g. Lewis v. American Federation of State, County, and Municipal Employees, AFL-CIO,* 407 F. 2d 1185, 1188, n. 3 (3d Cir.) *cert. denied* 396 U. S. 866 (1969). Provided that the federal claim is material (and not raised solely for the purposes of obtaining jurisdiction) and is not rendered frivolous by prior case law, a federal question will exist for purposes of 28 U. S. C. § 1331. *See Bell v. Hood,* 327 U. S. 678, 682-683 (1946).

In the action filed as No. 73-957, PAAC and Hardy argue that the Economic Opportunity Act (42 U. S. C. §§ 2701 et seq.) and regulations promulgated in furtherance thereof preclude Mayor Rizzo from removing PAAC's Executive Director. Specifically, they contend: (1) that as a condition to recognition of PAAC as a grantee agency, the Office of Economic Opportunity (OEO) required that the removal power within PAAC, and (2) that local law cannot supersede terms imposed by the OEO pursuant to federal law.[9] In essence, they claim that Mayor Rizzo's removal of Hardy contravened the Supremacy Clause of the United States Constitution by subordinating a Congressional mandate to local law.

We find that such a claim satisfies all the requisites of a substantial federal question. Essential to plaintiff-appellant's case is the claim that federal law (namely, the Economic Opportunity Act) precludes Mayor Rizzo from removing Hardy from office. If we read the Act as PAAC

9. *See* Appellant's Brief at 17.

and Hardy would have us read it, we might well be compelled to conclude that the Mayor is without authority to remove Rizzo; if, on the other hand, we interpret the Act as irrelevant to the issue of Hardy's removal, we could reach the opposite result. We have been cited to no case law that renders the claim frivolous. Since there is no doubt but that the $10,000 amount in controversy requirement is satisfied, we conclude (as did the District Court) that jurisdiction vests pursuant to 28 U. S. C. § 1331 to consider the legitimacy of Hardy's discharge.

B. *No. 73-957: The Peripheral Claims.*

As discussed above, the complaint in No. 73-957 charges that the Mayor: (1) illegally blocked appointments to PAAC, (2) illegally appointed persons to PAAC, (3) convened PAAC meetings, and (4) defamed the plaintiffs. With regard to the first three peripheral claims, the theory of illegality is based upon the argument that federal law (namely the Economic Opportunity Act and regulations promulgated in response thereto) prohibits the actions taken by the Mayor. For the reasons discussed above, we find that these claims too raise a substantial federal question.

We cannot, however, find an independent jurisdictional basis for plaintiffs' defamation claim.[10] If the District Court was correct in exercising jurisdiction of this claim, it could only be so as a result of the Court's power to exercise *pendent jurisdiction* over state claims related to legitimate federal claims. In *United Mine Workers of America v. Gibbs*,[11] the Supreme Court analyzed this power as follows:

10. *Cf.* People Cab Co. v. Bloom, 472 F. 2d 163 (3d Cir. 1972) (*per curiam*); Church v. Hamilton, 444 F. 2d 105 (3d Cir. 1971) (*per curiam*).

11. 383 U. S. 715, 725 (1966).

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .,' U. S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 U. S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole. (footnotes omitted).

See also Deaktor v. Fox Grocery Co., 475 F. 2d 1112, 1115-16, n. 2 (3d Cir.), *cert. denied* — U. S. — (1973).

We find that the defamation claim is factually distinct from the claims involving Mayor Rizzo's interference with the operation of PAAC. The defamation claim does not derive from a "nucleus of operative fact" common with the federal claims. Nor is the defamation claim one which we would "ordinarily expect" to be tried with the federal claims. Accordingly, we find that the doctrine of pendent jurisdiction is unavailable to justify the District Court's consideration of the defamation claim. We hold that the Court erred in exercising jurisdiction over same.

C. *No. 73-990: The Claim Removed from State Court.*

The removal statute, 28 U. S. C. § 1441, generally keys removal jurisdiction to original jurisdiction. A case which

originally may be brought in federal district court is generally removable upon defendant's petition. Where, as here, removal is predicated upon the assertion of a federal question, the principles discussed above with regard to § 1331 jurisdiction are applicable to removal from state courts. *See* Wright, Law of Federal Courts (2d ed. 1970) at 1304. Most importantly, the federal question must appear as an essential element of the plaintiff's complaint in state court. If the federal question arises only as a defense, or in anticipation of a defense, removal jurisdiction will not exist. *See, e.g. Tennessee v. Union and Planters' Bank*, 152 U. S. 454 (1894); *Crow v. Wyoming Timber Products Co.*, 424 F. 2d 93, 95 (10th Cir. 1970); *Romick v. Bekins Van & Storage Co.*, 197 F. 2d 369, 370 (5th Cir. 1952); *see also* Wright, Law of Federal Courts (2d ed. 1970) at 131 ("Defendant can remove a case where the plaintiff relies on federal law for his claim, though the plaintiff is perfectly willing to entrust his federal claim to a state court, but neither party can take the case to federal court where defendant sets up federal law as a defense to a non-federal claim by plaintiff.").

In the action commenced by the City of Philadelphia to restrain Hardy and Crippins from serving as PAAC's Executive Director and General Counsel, plaintiff's complaint is based entirely on state law. According to the complaint, the Mayor's authority to discharge the defendants is predicated solely upon the Philadelphia Home Rule Charter. The federal question in No. 73-990 thus arises only as a defense, Hardy and Crippens asserting that federal law supersedes the Charter and precludes their discharge. Since the federal question does not appear as part of the complaint well-pleaded, the state action is not properly removable, regardless of its similarity with No. 73-957. We find that the District Court erred in denying the City's motion to remand No. 73-990.

Our analysis discloses that the District Court was incorrect in concluding that subject matter jurisdiction exists to consider *all* claims raised in the consolidated actions. We need discuss the merits of only two sets of claims, the primary assertion that federal law precludes Hardy's discharge and the three peripheral allegations raised in PAAC's complaint (without the defamation claim).

III. The Merits.

A. *No. 73-957: The Primary Claim.*

Appellants assert that it was improper for the District Court to focus upon the issue of whether PAAC is administered as a "governing board" or a "community action board." They maintain that the essential structure of PAAC was developed before the adoption of the Green Amendments and has not been altered since. It is appellants' position that early negotiations between PAAC, OEO, and the City of Philadelphia led to the creation of an independent entity whose federally-imposed autonomy cannot be undermined by local law. They assert that:

> In view of the fact that the Green Amendments did not change the functioning of PAAC, resolution of such questions as who possesses the power to discharge the Executive Director of PAAC must depend on the nature of the arrangements, agreements and understandings reached through negotiations conducted by OEO, PAAC and the City of Philadelphia. A community action agency must be operated in accordance with the terms and conditions attached to the grant of federal funds.

Appellants' Brief at 14.

Both the District Court and the appellants construe the Federal Community Action Program as being man-

datory in form. The Court predicated its entire opinion upon the assumption that 42 U. S. C. § 2790 *requires* local governments to establish agencies which are administered either by governing boards or community action boards. Appellants, likewise, assume that it is *mandatory* that PAAC be operated "in accordance with the terms and conditions attached to the grant of federal funds."

Were we concerned herein with the eligibility of PAAC for federal funding, we, like the District Court and appellants, would regard federal law as mandatory. The instant case, however, does not center around federal funding. Rather, we are concerned with identifying the basic structure of PAAC. While the Economic Opportunity Act may strongly influence the structure ultimately developed, it is a matter for local governments to decide whether they will create poverty agencies that satisfy federal guidelines. Contrary to the assumptions made by the District Court and by the appellants, there is nothing in the Economic Opportunity Act (or in the regulations promulgated in furtherance thereof) which requires localities to establish community action agencies.[12] An agency which fails to comport

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12. Indeed, Congress has recognized that jurisdictions may be unwilling to establish agencies that conform with the federal guidelines. 42 U. S. C. § 2790(d) provides that:

> The Director may designate and provide financial assistance to a public or private nonprofit agency as a community action agency in lieu of a community action agency designated under subsection (2) of this section for activities of the kind described in this subchapter where he determines (1) that the community action agency serving the community has failed, after having a reasonable opportunity to do so, to submit a satisfactory plan for a community action program which meets the criteria for approval set forth in this subchapter, or to carry out such plan in a satisfactory manner, or (2) that neither the State nor any qualified political subdivision or combination of such subdivisions is willing to be designated as the community action agency for such community or to designate a public or private nonprofit agency or organization to be so designated by the Director.

with the Act's guidelines is neither illegal nor in contravention of the Supremacy Clause. Rather, it is merely an agency that may be forced to forego federal funding. In short, the Act does not establish powers in local agencies, but rather merely describes the powers that are prerequisites to federal funding.

To determine whether the Mayor or PAAC has the authority to remove Melvin Hardy, it is necessary to examine the documents which created PAAC rather than the federal guidelines which may or may not have been followed.[13] Section 3 of the Ordinance creating PAAC gives the Mayor the power to appoint the Executive Director.[14] Under Pennsylvania law, the power to remove an appointed officer is lodged in the same entity that has the power to appoint.[15] We thus agree with the District Court's conclusion that Mayor Rizzo has the authority to remove Melvin Hardy from office.

B. *No. 73-957: The Peripheral Claims (Other Than the Defamation Claim).*

We agree with the District Court that plaintiffs failed to satisfy their burden of proving the Mayor's alleged

13. We express no opinion as to whether or not PAAC has met the requisite federal guidelines. This issue is not before us.

14. The Ordinance (see p. 6, *supra*) does limit this appointment power somewhat, since the Mayor is free to choose only from a list of candidates selected by PAAC. However, the Mayor's ability to reject these candidates *ad infinitum* renders the limitation negligible.

15. Article 6, section 7 of the Pennsylvania Constitution provides:

> Appointed civil officers, other than judges of the courts of record, may be removed at the pleasure of the power by which they shall have been appointed.

The Philadelphia Home Rule Charter is entirely consistent with this constitutional directive, providing in § 9-200 that: "Any appointed officer may be removed at the pleasure of the appointing power."

interferences with PAAC. On the basis of the record herein, regardless of the effect of federal law, plaintiff-appellants cannot succeed on their peripheral claims.

The judgment entered in favor of the defendants in District Court No. 73-957 will be affirmed with respect to all claims but the defamation claim. The judgment entered in District Court No. 73-957 with respect to the defamation claim and the judgment entered in District Court No. 73-990 will be reversed for want of subject matter jurisdiction. To effect the above dispositions, the entire case will be remanded to the District Court for entry of a judgment consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1914

PAAC as a Commission and individually and Melvin L. Hardy, both as the Executive Director of PAAC and individually, and Isaiah W. Crippins, both as General Counsel of PAAC and as an individual member of the Philadelphia and Pennsylvania Bar

v.

Frank L. Rizzo, Mayor of the City of Philadelphia and as an individual; Phillip Carroll, Deputy Mayor of the City of Philadelphia and as an individual; John Taglianetti, Assistant to the Mayor of the City of Philadelphia and as an individual; Hillel Levinson, Managing Director of the City of Philadelphia and as an individual; Lawrence Campbell, Deputy Managing Director of the City of Philadelphia and as an individual; Joseph W. Hickey, Deputy Finance Director of the City of Philadelphia and as an individual; Lennox L. Moak, Director of Finance of the City of Philadelphia and as an individual; Tom Gola, City Controller of the City of Philadelphia and as an individual; Peter Rothberg, Assistant to the Mayor of the City of Philadelphia and as an individual; William T. Peterson, allegedly the Acting Executive Director of the Philadelphia Anti-Poverty Action Commission; and Albert Letson, as an individual; Solomon Polen, Director of Finance, P.A.A.C., and as an individual

(D. C. Civil No. 73-957)

CITY OF PHILADELPHIA

v.

MELVIN L. HARDY and ISAIAH CRIPPINS

(D. C. Civil No. 73-990)

PAAC as a Commission and individually and Melvin L. Hardy, both as the Executive Director of PAAC and individually, and Isaiah W. Crippins, both as General Counsel of PAAC and as an individual member of the Philadelphia and Pennsylvania Bar, plaintiffs in Civil Action No. 73-957 and Melvin L. Hardy and Isaiah Crippins, defendants in Civil Action No. 73-990,

Appellants,

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN, WEIS and GARTH, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeal of Isaiah Crippins is dismissed for failure to prosecute, in accordance with the opinion of this Court. It is further ordered and adjudged that the judgment of the said District Court entered August 17, 1973, be, and the same is hereby affirmed with respect to

all claims in District Court No. 73-957 except for the defamation claim. The judgment entered in District Court No. 73-957 with respect to the defamation claim, and the judgment entered in District Court No. 73-990 will be reversed for want of subject matter jurisdiction. The entire case is remanded to the District Court for entry of a judgment consistent with the opinion of this Court.

ATTEST:

THOMAS F. QUINN,

Clerk.

June 14, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1914

PAAC etc., et al.

v.

FRANK L. RIZZO, etc., et al.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by PAAC as a Commission and individually and Melvin L. Hardy, Appellants, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Chief Judge Seitz would grant rehearing by the Court in banc.

By THE COURT,

(NAME ILLEGIBLE)

Judge.

Dated: July 29, 1974